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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 814

RICHARD D. IRWIN AND ANNE MARIE IRWIN,
Petitioners,

vs.

DEMPSEY-TEGELER & CO., INC., A CORPORATION,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI.

(Opinion of District Court.)

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI.

(Opinion of District Court.)

IN THE UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division
No. 66 C 2180

MEMORANDUM OPINION.
(Filed April 1, 1968)

Plaintiff's Motion for Summary Judgment.

This is a two count action for conversion and breach of contract. Plaintiff, Dempsey-Tegeler & Co., Inc., has moved for summary judgment.

The factual situation leading to this litigation is somewhat complex, and in order to properly consider the motion for summary judgment, we will set forth the circumstances in detail. It should be noted that numerous documents and voluminous briefs have been furnished to the Court in connection with the instant motion, and considerable depositional discovery has already taken place.

Plaintiff, a securities dealership agency, seeks to recover from defendants Richard D. and Anna Marie Irwin, its former customers, damages for 500 shares of stock of National Video Corporation, which, the complaint alleges, the defendants converted and failed to deliver to plaintiff in breach of their contractual obligations. The defendants are husband and wife, who dealt with the plaintiff through Robert Shields, a securities salesman employed by plaintiff in its Chicago Heights, Illinois, office. Defendant Richard

Irwin is the founder, president, and principal stock holder of Richard D. Irwin, Inc., a publicly held book publishing company. He apparently is a man with impressive business credentials, who has engaged in a substantial volume of stock market transactions during the past several years. A large percentage of his trading was conducted through Mr. Shields, commencing in late 1963. All of defendants' transactions with plaintiff were cash transactions, and plaintiff never arranged any credit for defendants to purchase or carry securities. Mr. Irwin handled all securities transactions for his wife's account and had full authority from her to buy or sell securities on her behalf. Because of the demands of his employment, and the frequent travel that entailed, Irwin was unable to follow the stock market regularly. Consequently, he told Shields at the outset of their relationship that he would require Shields to keep a complete record of his securities transactions and positions, so that he would know what stocks he owned, and what his positions and costs were. Irwin kept no account book or separate record of his securities transactions. Shields maintained a reference book which reflected Irwin's position with respect to securities the Irwins had purchased or sold.

The present litigation stems from a series of transactions in stock of National Video Corporation, carried out by the defendants through the plaintiff during 1964 and 1965. In December, 1964, and April, 1965, defendants purchased a total of 1500 shares of National Video stock at an approximate cost of $42,500. On September 29, 1965, the Irwins sold 500 shares of National Video through Dempsey-Tegeler. According to the rules of the American Stock Exchange and the rules of the National Association of Securities Dealers, the shares so sold were required to be delivered by defendants to plaintiff by October 5, 1965. They

were not delivered by that date, and in fact, were not delivered until October 19, 1965.

However, in the interim, on October 13, 1965, by action of the shareholders of National Video, each outstanding share of National Video held of record as of October 14, 1965, was split two for one. On October 8, 1965, the American Stock Exchange made a ruling concerning the proposed split, which provided that, if the split became effective, all certificates of National Video delivered after October 14, 1965, in settlement of any transaction made prior to November 1, 1965, must be accompanied by due bills, and that common stock of National Video would be quoted "ex-dividend" on and after November 1, 1965.

On October 18, 1965, plaintiff requested the defendants to deliver 500 shares of National Video to cover the sale of September 29, and such shares were delivered on October 19, 1965, as above noted. No due bills were requested by plaintiff and none were delivered.

On October 22, 1965, prior to the ex-dividend date of November 1, the Irwins sold another 500 shares of National Video. On October 28, 1965, the Irwins received 1500 shares of National Video stock as a result of the stock split. Because they had not delivered the shares sold on September 29 until October 19, they were still the holders of record on October 14 of 1500 shares, and for that reason received 1500 shares in the split. Even though Irwin received 1500 shares from the split because of his record position on October 14, it is easily seen that he legally only had a right to keep 500 shares, since he had sold 500 shares prior to the split, and had sold 500 shares on October 22 prior to the ex-dividend date.

On November 3, 1965, the Irwins sold another 500 shares of National Video, and on November 4, 1965, sold a further 500 shares, both transactions taking place through plaintiff.

In mid-November, Shields instructed Irwin that he owed plaintiff 2000 shares. Pursuant to that instruction and request, Irwin's secretary, Mrs. Bogan caused 2000 shares of National Video to be delivered to plaintiff on November 16 and 17, 1965. It can be seen from the following chart that, in fact, defendants owed plaintiff 2500 shares at that time. Hence, after delivery of the 2000 shares, defendants were "short" 500 shares, although apparently neither they nor Shields realized it at the time.

Date	# of shares received	# of shares sold	# of shares delivered	Balance of shares possessed	Balance of shares Actually Owned
12/16/64	500	—	—	500	500
4/20/65	1000	—	—	1500	1500
9/29/65	—	500	—	1500	1000
10/19/65	—	—	500	1000	1000
10/22/65	—	500	—	1000	500
10/28/65	1500	—	—	2500	1000
11/3/65	—	500	—	2500	500
11/4/65	—	500	—	2500	0
11/16 & 17/65	—	—	2000	500	0

Irwin testified in his deposition that his month-end customers' statements for November and December, 1965, which reflected a short position of 500 shares, were not received by the Irwins until March, 1966.

On December 27, 1965, while in Fort Lauderdale, Florida, Irwin sold the 500 shares which he continued to hold, for approximately $39,600, through Hayden Stone, Inc., in Fort Lauderdale. Irwin testified that he did not know at the time of this sale, that the records of plaintiff showed him short 500 shares. He added, that had he known plaintiff was going to demand 500 shares of National Video from him, he would not have sold the 500 shares through Hayden Stone.

Irwin further testified that he was not aware until late February or early March, 1966, that plaintiff's records showed him to be in a short position.

Although from the records of plaintiff, the Irwins were short 500 shares from and after October 19, 1965, Travers Bell, Jr., the plaintiff's cashier in Chicago, did not realize the Irwins were short 500 shares until early January when he reviewed the customers' monthly statements for December, 1965. In his judgment, a short position remaining open for such a period of time was not in the ordinary course of business and was very unusual. He immediately contacted Shields. Shields did not know of the short position until contacted by Bell, and was surprised about this development.

Shields then contacted Irwin and told him that plaintiff had discovered that he was short 500 shares of National Video. Shields, however, really was not sure himself of the facts involving the 500 shares, and told Irwin; "this is the most fouled up thing I've seen." Shields admitted to Irwin that plaintiff "apparently did not know what they were doing when he (they) requested (delivery of) the two thousand shares." The date of this conversation is in dispute, plaintiff putting it in early January, 1966, and defendant placing it in late February, or early March, 1966. However, for purposes of this motion, we do not think the dispute is material. Irwin told Shields that he was unaware of any short position, that he had never been in a short position, and "that if they could prove to me that I owed the shares, I would deliver the shares if I had to purchase them." (Irwin Dep. II, pp. 44-45.) He further stated at his deposition: "And I made the statement to him at that time that I had no desire to prove it at the expense of anybody, and that if I owed the shares, I would deliver the shares. But I wanted proof of it." Shields said that he would contact Bell to get further information.

Apparently, Irwin was surprised at the revelation of his short position, for in December, 1965, he had called John D'Asaro, an accountant employed by the firm of Ernst & Ernst, auditors for Irwin's company, who also handled his personal income tax returns. He told D'Asaro, that upon information of his broker, Mr. Shields, plaintiff's records of his transactions in National Video were mixed up, and he wanted to know what his position in that stock was. D'Asaro asked his client what transactions he had made during October, November and December and from that information erroneously concluded and told Mr. Irwin that the defendants owned the 500 shares of National Video which they had retained. D'Asaro did not ask Irwin the dates he had delivered the National Video shares sold through plaintiff, but apparently assumed that the shares defendant sold on September 29 had been delivered in time to be transferred out of the Irwins' names before the October 14 record date. Irwin apparently did not tell his accountant that, in fact, these shares were delivered after the record date. The accountants similarly did not ask, nor were they told by Mr. Irwin, how many shares he actually received in the stock split.

After the conversation with Shields in early 1966, in which Irwin was informed of his short position, he again contacted his accountants and asked them to check his records. Several conversations thereafter transpired between Shields and Irwin or his secretary, Catherine Bogan, with respect to the alleged short position. On March 17, 1966, a three page written demand for delivery of 500 shares was sent by Travers Bell to Irwin. The letter recapitulated the Irwins' transactions in National Video, and concluded with the request that the defendants forward the 500 shares as soon as possible. On March 21, 1966, Irwin replied to Bell acknowledging receipt of his letter, and stating that he would hold it in his files until

he heard from his accountants, at which time he would contact Bell. It is indicative of Shields' confusion in the matter that on March 17, 1966, he informed Mrs. Bogan that the record date of the split was October 28, 1965, and that the first shares sold by the Irwins had been delivered to plaintiff on the same date. The fact was that the record date of the split was October 14, and the first shares sold had ben delivered on October 19. Also Shields admitted in his deposition that when he talked with Mrs. Bogan on March 17, he was still confused as to what had happened with respect to the 500 shares and that as of that date he still was not positive of the Irwin's position in National Video.

On March 23, 1966, Mr. D'Asaro wrote to Irwin listing defendants' transactions and concluding that following the defendants' sales on November 3 and 4, the Irwins were entitled to retain a balance of 500 shares. In preparing this letter, D'Asaro apparently made no new investigation, but simply reviewed the documents and publications which he had consulted in December in initially reaching the same erroneous conclusion. On March 25, Irwin answered this letter, transmitting a copy of Mr. Bell's letter of March 17, and suggesting that Mr. D'Asaro check it and call Irwin back.

On March 28, 1966, John Goebel, an attorney for plaintiff, wrote to Irwin demanding delivery of the 500 shares within five days. Irwin apparently ignored the letter because the matter was still in dispute and under consideration by his accountant.

On April 15, 1966, Bell called Irwin at Columbus, Ohio, where Irwin was attending a business meeting. Bell demanded delivery of 500 shares and said that if they were not delivered, plaintiff would purchase the shares to cover the short position and charge the Irwins' account for

them. Irwin said he had not heard anything more from his accountants. Bell called Irwin a liar. Thereupon, arrangements were made for Bell and Irwin to talk simultaneously with D'Asaro in Chicago. During that call, D'Asaro was evasive, but finally, after being pinned down by Irwin stated that Irwin owed the 500 shares. Subsequently, Irwin received a letter from D'Asaro dated April 15, the date of the telephone call, in which D'Asaro corrected his previous error and advised Irwin that he was in fact short 500 shares of National Video. The error is explained in a memorandum dated April 27, 1966, prepared by D'Asaro.

On April 15, 1966, plaintiff sent telegrams to the defendant demanding delivery of the missing shares by 12 o'clock noon on Monday, April 18, 1966, or plaintiff would buy in 500 shares of National Video for defendants' accounts at the current market price. Subsequently, Irwin advised plaintiff by wire that any shares purchased for his account would be purchased entirely at the risk of plaintiff. On April 18, plaintiff purchased 500 National Video shares in the open market at an aggregate cost of $55,417.96, for which it now sues defendants. The market price was approximately $111 per share. By contrast, at the time when Irwin stated he would deliver the shares if it was proved that he owed them, the stock traded between a high of $88.25 and a low of $70.25 per share. Later, in May, 1966, when the market price was again down to approximately $76.50 per share, the defendants purchased 500 shares of National Video, and unsuccessfully offered them to plaintiff in exchange for a full release of liability.

Defendants' Answer to the Complaint denies any liability. In Affirmative Defense, they raise several matters, including various breaches of contractual duty on the part

of plaintiff, and violations of the Securities Exchange Act of 1934, and of certain rules of the American Stock Exchange.

Plaintiff apparently is willing to concede that its agents gave erroneous advice when they informed the defendants in November that they then owed only 2000 shares. It further is willing to admit the possible disadvantages which could have been caused by its delay until even late February or early March in informing defendants of their short position. Those defenses are raised by defendants to challenge plaintiff's claims which are based upon conversion and breach of contract. However, even assuming the above facts, plaintiff contends that its claims are valid because Irwin's admitted conduct in promising to replace the missing shares if proof was supplied, amounted to a ratification of plaintiff's delays and erroneous advice, and plaintiff relied upon such assurance to its detriment, thereby estopping defendants to deny its liability.

Defendants apparently do not challenge the fact that Irwin promised to deliver the shares if proof could be furnished to show that they owed them. However, they raise several objections to the summary judgment motion including the argument that plaintiff's motion is based upon a theory foreign to the pleadings. Also they charge that material facts remain in dispute inasmuch as (1) it has allegedly not been established that Irwin's promise was made voluntarily and with full knowledge and in light of all the facts and circumstances surrounding plaintiff's wrongdoing, and (2) it has allegedly not been established that plaintiff relied upon Irwin's promise, especially since the facts of such alleged reliance are based upon averments not within the knowledge of defendants.

In the first place, defendants argue that the motion for summary judgment abandons the theories of recovery

relied upon in the Complaint—to wit, breach of contract and conversion—and instead raises for the first time the theories of ratification and equitable estoppel based upon reliance. This argument need not detain us unduly. Certainly, plaintiff's motion is founded upon the theories advanced in the Complaint. The theories of ratification and estoppel are essentialy used as rebuttal arguments, and are raised only in response to the defenses of breach of duty and delay, interposed by defendant. Hence, this initial argument of defendants is wholly without merit.

Secondly, defendants challenge the theory of ratification on the ground that it is yet in dispute whether Irwin's contingent promise to supply the missing shares was made voluntarily and with full knowledge and in light of all the facts and circumstances surrounding plaintiff's derelictions. It is not disputed that plaintiff's erroneous advice and delay in correcting same constituted a negligent breach of its contractual duty as broker to its customer. Nor is it disputed that when informed of the error, in early 1966, Irwin promised to deliver 500 shares when furnished proof that the shares in fact were owing.

The principle of ratification is explained in Meyer, *The Law of Stock Brokers and Stock Exchanges,* 408-412 (1931), as cited by plaintiffs as follows:

> "The general principle is that any wrongful act on the broker's part may at the election of the customer be either ratified or repudiated.
>
> * * * * *
>
> "Any wrong committed by a broker, no matter how serious and no matter what its nature, is susceptible of ratification. This applies to the improper execution of [or] non-execution of an order, to the wrongful sale of the customer's securities or the wrongful covering of short commitments, and to all kinds of miscellaneous breaches of duty to which the broker may

become during the course of relations with his customer.

* * * * *

"The first principle of ratification in stock brokerage transactions is that a customer who wishes to take advantage of his broker's wrongful act must repudiate that act. If he does not he is deemed to have ratified it. He may not merely sit by and do nothing, but is bound at the risk of the loss of his claim affirmatively to indicate his repudiation.

> 'Ratification may be proved, not only by an express assent * * * but also by implication from the principal's acquiescence or failure to dissent within a reasonable time after being informed by the agent of what he has done.'

"This doctrine is not unfair, for the customer should not have the privilege of withholding approval or disapproval until the market has taken a turn for better or for worse, and then assuming the position which turns out the more profitable. To accord the customer that privilege would enable him to speculate at the broker's expense. Moreover, the broker should not be placed in a position where he does not know whether his act will be affirmed or disaffirmed, and therefore cannot act intelligently to minimize his own loss before the market has undergone too great a change. The obligation to repudiate, however, does not depend on whether or not the broker in fact relies on the customer's silence."

Applying that language to the instant set of facts, it is clear that Irwin did not merely silently acquiesce in plaintiff's negligent wrongdoing, but rather affirmatively promised to tender the disputed shares if competent proof could be supplied that they were owing, *even if he had to go out and purchase them.* He did not repudiate his liability until April 15, 1966, after the time when proof of liability was furnished, not only by plaintiff but by his own accountants. We think plaintiff was entitled to

rely upon Irwin's representation, as an assurance that defendants would make good their obligations, despite plaintiff's prior erroneous advice and delays.

The two cases cited by plaintiff are apt illustrations of the principle of ratification as it should apply herein. See *Roney* v. *Mazzara,* 319 Mich. 103, 29 N. W. 2d 259 (1947), and *Gillett* v. *Whiting,* 141 N. Y. 71, 35 N. E. 939 (1894).

Plaintiff agrees with the general proposition that the person charged with ratification must have acted voluntarily and with full knowledge and in light of all the facts and circumstances surrounding such wrongdoing. *Coleman* v. *Connolly,* 242 Ill. 574, 582-83 (1909). Defendants argue that Irwin did not know all the facts and circumstances surrounding the plaintiff's wrongdoing, and thus could not be charged with ratification. They point to the fact that not only Irwin, but also Shields was unaware that the defendants were in a short position. Indeed, as late as March 17, 1966, Shields admitted his confusion to Irwin's secretary. And initially at least, defendants' short position was supported only by Bell's statement to Shields to that effect.

However, the true facts of defendants' position in National Video is irrelevant to the issue of ratification. Irwin's promise contemplated that he would make up the asserted short position if it could be proved that he was short. Whether or not he actually knew he was short at the time he made the promise, is irrelevant to the force of that promise. To say that he cannot be held to such an unqualified promise, because he did not in fact know for certain that he was short, would make the promise virtually meaningless. Of course he did not know the true facts of the situation, for if he had, there would have been less occasion to make the promise in the contingent manner in which it was made.

Further, defendants, have pointed to no material fact regarding the plaintiff's breaches of duty, which Irwin did not know, but should have known in order to be bound by his ratification. It is not relevant that he was uncertain of his position in National Video. What is relevant is that at the time of his promise, he knew all of the material facts regarding the prior breaches of duty he has charged against plaintiff. He knew that plaintiff was calling upon the defendants to deliver 500 shares of National Video stock which plaintiff claimed were owing from sales in late 1965. Because he was apparently unaware of his short position, he demanded verification, requested his accountants to check into the matter, and expressly promised he would deliver the missing shares if it developed that he owed them. At that time, Irwin had full knowledge of all of the circumstances surrounding the alleged breaches of duty. Although defendants claim to the contrary, they have cited no specific facts of which he was unaware which might have affected the making of the promise.

As explained in the Meyer treatise cited above, the doctrine of ratification is designed to prevent a customer from speculating at his broker's expense, and to be sure that the broker will know whether his acts will be affirmed or disaffirmed and be able to act to minimize his own loss before the market changes. The price prevailing at the time Irwin ratified plaintiff's wrongdoing by his promise was substantially below the market price on April 15, when Irwin repudiated his obligation. This seems to be the type of case in which the doctrine of ratification should be applied. In our judgment, defendants were bound by Irwin's promise, which acted to ratify plaintiff's prior wrongdoing.

Furthermore, we do not believe that any issue of material fact exists with respect to the question of reliance, Mr. Ellis, Executive Vice-President of plaintiff's Great

Lakes Regional Office, in Chicago, testified quite explicitly that plaintiff relied upon Irwin's promise. He testified that when a customer fails to deliver securities sold by him, plaintiff's policy is to have its registered representative contact the customer to obtain delivery. If the customer repudiates his contract, plaintiff's policy is to cover the sale and charge the customer for any resulting loss. Considering Irwin's reputation, his relationship with plaintiff, the fact that plaintiff had never had any trouble with Irwin, plus Irwin's assurance that if he were short, he would supply the stock, it is most reasonable to assume that plaintiff had no reason to be alarmed about the Irwins' short position, and relied upon Mr. Irwin's assurance.

That neither Shields nor Bell testified regarding reliance, does nothing to disturb this conclusion. When Bell directed Shields to inform Irwin of his short position, Irwin made his promise to cover any short position and asked his accountants to check his records. After receiving Bell's letter of March 17, he replied that he would communicate with Bell after hearing from his accountants. He did not receive final word from his accountants until April 15, at which point he repudiated his obligation and promise.

The effect of Irwin's assurance was to tell plaintiff that it need not take any action to protect itself while his accountants were determining his position. This obviously was the reason plaintiff waited until April 18 before covering Irwin's short position. That Bell and Shields continually pressed Irwin for an answer does not negate their reliance on his promise. It was consonant with their position and responsibilities to seek an early determination of the matter, rather than allowing it to await the leisure of the defendants or its accountants. A probable reason for the delay until April 15 was the accountants' reluctance to admit its mistake. Certainly as registered dealers, plain-

tiff had an obligation to make provisions to cover the missing shares as soon as possible. Its agents' repeated attempts to obtain the shares from Irwin was only in pursuance of their professional responsibilities.

That Ellis' testimony on the reliance issue came only two week prior to the close of discovery does not detract from the weight to be accorded it, especially in the absence of any facts to suggest that it is inaccurate. Although testimony respecting reliance is a matter peculiarly within the knowledge of plaintiff's agents, defendants had an ample opportunity to cross-examine Ellis on this point, but made no attempt to shake his testimony thereon, even though they subjected him to substantial cross-examination on other matters.

Defendants assert that they have had no opportunity to disprove the plaintiff's evidence of reliance. However, they fail to describe any facts whatever that they hope or expect to obtain by further discovery on this matter. Discovery in this case has been closed for some time. The law is clear that summary judgment may not be thwarted by mere hypothesis. Where specific proof is offered to support the motion, the party opposing it must at least set forth something specific which it believes can be adduced which would create an issue of fact. *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715, 718 (2d Cir. 1943). The instant defendants have failed to do so here.

Equitable estappel is a proper doctrine to apply in the instant factual situation. Not only did plaintiff rely on Irwin's promise, but in addition, plaintiff's derelictions, later ratified by Irwin, cause no damage or loss to defendants. The only consequence of plaintiff's actions was that defendants were left with 500 shares which did not belong to them, and which they sold for almost $40,000. Even had

the plaintiff's breaches of duty not been ratified such wrongdoing should not inure to defendants' benefit where they suffered no loss thereby. The upshot of this entire sequence of events is that defendants have thus far been unjustly enriched in a substantial sum.

In view of the finding which we have made above on the issues of ratification and reliance, it is clear that plaintiff is entitled to recover on either of its theories of conversion or breach of contract.

To recover for conversion, the plaintiff need only show its right to possession of 500 National Video shares which defendants unlawfully retained in their possession during the period of the contract. Plaintiff had this right by virtue of the defendants' contract requiring them to deliver the stock upon its sale. See *Horn v. Nessen Lumber Co.*, 236 Ill. App. 187, 207-08 (1925); and see Annot. 83 A. L. R. 1199. The cases cited by defendants are inapposite to the instant factual situation.

Furthermore, plaintiff assumed breaches of its contractual duty, which were raised in defense of the action for breach of contract, are no longer of any force, due to our findings of ratification, reliance and estoppel. And as plaintiff observes, the authorities cited by defendants on this point have nothing to do with the facts of this case. Although other distinctions exist, it is sufficient to point out that they relate to the acceptance of "goods" by failing to reject them within a reasonable time, rather than to the delivery by a customer to his broker of securities which he owes.

Nor are the other affirmative defenses raised by defendants of any value in resisting the motion for summary judgment. Defendants apparently acquiesce in that viewpoint, for in their answering brief, they have failed to

respond to the arguments put forth in opposition to those defenses by plaintiff.

Defendant has not specified how plaintiff has violated the margin rules of Regulation T. (12 C. F. R. Part 220 (1967)). Those rules relate solely to margin accounts, not to cash accounts which are involved here. The failure of plaintiff to buy in shares for defendants' account until April 18, does not constitute an extension of credit. See Section 4(c)(ii) of Regulation T. Furthermore, Section 6(k) of Regulation T excuses any violations which are based upon innocent mistake, if prompt action is taken to remedy the mistake after its discovery. Thus even if plaintiff were guilty of a technical violation, which it is not, it would be exonerated under Section 6(k). As stated above, defendants apparently have no quarrel with this conclusion.

Nor is plaintiff barred from recovery for failing to request due bills when defendants delivered shares on October 19. Although the American Stock Exchange rule of October 8, 1965, relating to the National Video split, directed the transmission of due bills in certain circumstances, Mr. Ellis testified, and it apparently is not disputed, that the requirement of due bills applies only to dealings between brokers on the floor of the Exchange. Under industry practice, due bills are not exchanged between a broker and his customer. Clearly, defendants' argument, made only in affirmative defense to the Complaint and not advanced or supported in opposition to this motion, has no merit.

Finally, defendants' attempt to invoke the doctrines of estoppel and waiver on their own behalf is unavailing. There is no evidence that defendants relied upon plaintiff's erroneous advice to its detriment, a necessary element of estoppel. The only consequence of defendants' reliance

was that they remained in possession of stock which did not belong to them. When they sold the stock on December 27, 1965, they did so partially upon the erroneous advice of their own accountants. In any event, Irwin ratified the wrongful actions of plaintiff. Once plaintiff relied upon that representation, defendants were estopped to challenge their own breach of contract.

Plaintiff cannot be deemed to have waived its contractual rights by its delay in requesting the missing shares. Waiver is the knowing and deliberate relinquishment of a right. *Perin* v. *Parker,* 126 Ill. 201 (1888). Plaintiff never intended to waive its rights. Indeed, we have already held that it relied upon Irwin's ratification. Defendants' argument is without basis.

Since we believe there are no issues of material fact remaining for decision, we shall grant plaintiff's motion for summary judgment.

The parties are directed to prepare an order to that effect.

Enter:

/s/ Abraham L. Marovitz,
Judge.

Dated: March 29, 1968.

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DEMPSEY-TEGELER & CO., INC., A CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Richard D. Irwin and Anne Marie Irwin, his wife, respectfully pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit in this cause.

OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Seventh Circuit, which was rendered on August 5, 1969, is not yet reported, and such opinion is appended hereto, *infra,* pp. 1a-6a. In addition, the judgment of the Court of Appeals is appended hereto, *infra,* p. 7a.

The Opinion of the District Court in this matter is not reported, and such opinion is included in the Joint Appendix which is a part of the record certified to this Court.

JURISDICTION.

The judgment of the United States Court of Appeals was entered on August 5, 1969, and the Petitions for Rehearing and Rehearing En Banc (which were filed on September 3, 1969) were denied on September 25, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

Respondent Dempsey-Tegeler & Co., Inc. (hereinafter sometimes "Dempsey-Tegeler"), a securities dealer, brought an action against Petitioners Richard D. Irwin and Anne Marie Irwin (hereinafter sometimes "Irwin"), customers of Dempsey-Tegeler, for breach of contract and conversion of securities. The answer alleged wrongful conduct and various breaches of duty on the part of Dempsey-Tegeler. Trial by jury was seasonably demanded.

The District Court entered summary judgment against Petitioners holding, *inter alia*, that:

1. Irwin had, as a matter of law, ratified the wrongful conduct and breaches of duty of Dempsey-Tegeler, and

2. There was no genuine issue of material fact as to the requisite *knowledge* of Irwin in order to constitute a ratification.

The Court of Appeals affirmed these holdings of the District Court under Rule 56.

Thus, the questions presented for review are:

1. Was Irwin denied his constitutional right to a jury trial through the implement of summary judgment under Rule 56?

2. Was summary judgment properly entered below in view of the fact that one of the essential elements of

ratification is the *knowledge* and *intention* of the ratifier?

3. Was there a genuine issue of fact for a jury with respect to Irwin's *knowledge* of the wrongdoing and breaches of duty of Dempsey-Tegeler and his *intention* with respect thereto?.

4. Has the Court of Appeals decided a question of federal law under Rule 56 in a way that is in conflict with the decisions of this Court in *White Motor Co.* v. *United States,* 372 U. S. 753 (1962); and *Poller* v. *Columia Broadcasting System, Inc.,* 368 U. S. 464 (1962).

5. Has the Court of Appeals decided a question of federal law under Rule 56 which is in conflict with the decision of this Court in *United States* v. *Diebold, Inc.,* 369 U. S. 654 (1962), and the decisions of the Courts of Appeals for the Second, Sixth, Eighth, Ninth and Tenth Circuits.

CONSTITUTIONAL PROVISION AND RULE INVOLVED.

Constitutional provision involved:

The Seventh Amendment to the Constitution of the United States, which, in pertinent part, reads:

> "In Suits at common law . . . , the right of trial by jury shall be preserved. . . ."

Rule involved:

Rule 56 of the Federal Rules of Civil Procedure, which provides in pertinent part:

> "The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."

STATEMENT OF THE CASE.

Nature of the Action, Proceedings and Disposition Below.

Dempsey-Tegeler & Co., Inc. brought an action against Richard D. Irwin and Anne Marie Irwin, his wife, alleging: (1) that the defendants converted 500 shares of the common stock of National Video Corporation which was the property of the plaintiff, and (2) that defendants breached an implied contract arising from the customs and usages of the securities markets and their relationship as customers and stockbrokers by failing to deliver to plaintiff 500 shares of such common stock. Defendants' answer denied liability for breach of contract or conversion, and affirmatively alleged: (1) that the liability asserted was unenforceable and void because the pertinent transaction was made and recorded by Dempsey-Tegeler in violation of the rules and regulations of the American Stock Exchange, (2) that Dempsey-Tegeler was under a duty to seasonably inform them of delivery and settlement requirements with respect to their securities transactions and that Dempsey-Tegeler failed to perform such duty, (3) that any damage suffered by Dempsey-Tegeler was due to its aforesaid breaches of duty, and (4) that Dempsey-Tegeler was estopped from asserting and had waived any right to additional deliveries of the common stock of National Video.

Defendants, Petitioners here, demanded a trial by jury.

Plaintiff Dempsey-Tegeler's motion for summary judgment was granted, and the court entered judgment in the amount of $55,417.96 plus interest from the date thereof.

The judgment of the District Court was affirmed.

STATEMENT OF FACTS.

Dempsey-Tegeler is a broker and dealer in securities and is a member of the New York Stock Exchange and the American Stock Exchange (4). Defendants, Richard D. Irwin and Anne Marie Irwin, are husband and wife and were regular customers of Dempsey-Tegeler or its predecessors from 1963 until April, 1966 (174, 176). Richard D. Irwin acted as the agent of Anne Marie Irwin in all transactions with Dempsey-Tegeler (9-10). Irwin's security transactions through and with Dempsey-Tegeler were substantial (177).

In his dealings with Dempsey-Tegeler, Irwin dealt solely with Robert F. Shields, a registered representative of Dempsey-Tegeler and manager of its branch office in Chicago Heights, Illinois (181-182, 56-57). Shields was responsible for the supervision of the receipt and delivery of securities in that office (50-51). The Chicago Heights office had no "cashier", and consequently bookkeeping functions, particularly with respect to the receipt and delivery of securities, were handled for that office by the "cashiering" department of Dempsey-Tegeler's Chicago office (62-63, 89-91). In 1965, Travers Bell, Jr. was in charge of the "cashiering" department of the Chicago office (62-63).

At the time Irwin commenced his relationship with Shields, he informed Shields that the demands of his business did not permit him to devote his attention to the particulars of his securities transactions or to the stock market in general (229). Shields informed Irwin that he would keep a complete record of Irwin's account so that Irwin would know at all times his position in the securities he had purchased (229, 223). Irwin told Shields that his account would require that type of attention (229, 223).

Subsequent to the inception of this relationship and until the controversy giving rise to this litigation, Irwin depended upon Shields for such information and attention (229, 223, 176). Irwin kept no record or account of his securities transactions or security positions (175). Dempsey-Tegeler, through Shields, attempted to keep such records (59-62, 64-5).

On September 1, 1965, Irwin owned of record 1500 shares of National Video Corporation (180-182). These shares were listed and traded on the American Stock Exchange (4, 10). On or about September 13, 1965, National Video Corporation, announced that it proposed a "two for one" stock split with respect to its outstanding common stock and that such proposal would be acted upon at an annual meeting of its shareholders to be held on October 13, 1965 (194-195).

On September 29, 1965, Irwin sold 500 shares of National Video through Dempsey-Tegeler (179).

On October 8, 1965, the American Stock Exchange, in a notice transmitted by ticker tape to its members, ruled and ordered with respect to transactions in National Video, *inter alia*, that:

> (a) In the event of stockholder approval of the proposed split and effective October 14, 1965, transactions in National Video might be settled either by delivery of the old certificates then outstanding or by certificates to be outstanding as a result of the split.
>
> (b) The common stock of National Video be quoted "ex" the distribution on November 1, 1965.
>
> (c) All stock delivered after October 12, 1965, in settlement of transactions made prior to November 1, 1965, must be accompanied by due bills and that such due bills must be redeemed on November 5, 1965 (16-17).

Dempsey-Tegeler had notice or knowledge of this ruling and order of the stock exchange shortly after it was made (117).

On October 18, 1965, at Shields' request, Irwin through his secretary delivered (against the sale of September 29, 1965) 500 shares of National Video Corporation stock to Dempsey-Tegeler (66-68, 29-32). On October 19, 1965, Dempsey-Tegeler issued its receipt to Irwin evidencing receipt of those 500 shares (29-32, 66-68). Shields and Dempsey-Tegeler did not request or require that Irwin also deliver due bills in connection with this delivery (29, 229-230, 84-85). Under the ruling of the stock exchange such a request should have been made (16-17, 110). Shields was not aware of the stock exchange ruling, and Bell did not inform Shields of it (84, 110). Although there was a practice and policy of Dempsey-Tegeler to notify customers of deficient deliveries with respect to stock being delivered after the record date of a dividend or stock split, Shields made no such notification and he was not aware of any notification being made by any other employee of Dempsey-Tegeler (85). Irwin was not aware that his delivery was in any way deficient (229, 230).

On October 22, 1965, Irwin sold an additional 500 shares of National Video (180). Sometime after October 28, 1965, Irwin received 1500 shares of National Video as a result of the split (197). On November 3, 1965, Irwin sold another 500 shares of National Video (180). On November 4, 1965, Irwin sold still another 500 shares of National Video (180).

On or about November 16, 1965, Shields informed Catherine Bogan, Irwin's secretary, that Irwin owed and was required to deliver to Dempsey-Tegeler 2000 shares of National Video (197-198, 29-30). In accordance with such advice by Shields, Irwin delivered 2000 shares of National Video to Dempsey-Tegeler (29-30). Irwin was informed

that that was all the shares of National Video owed to Dempsey-Tegeler (200-201). No due bills or additional shares of National Video were requested by Dempsey-Tegeler at or about the time of this final delivery or at any time until late February, 1966 (30, 222-223).

On December 27, 1965, Irwin, while in Fort Lauderdale, Florida, sold 500 shares of National Video through one James Sullivan, a personal friend of Irwin who was associated with the Fort Lauderdale office of Hayden, Stone, a broker and dealer in securities (203, 180). At the time of the sale through Hayden, Stone, Irwin did not know that Dempsey-Tegeler would thereafter demand the delivery of an additional 500 shares of National Video (229-230) The gross proceeds of this sale was approximately $38,000 (180). Irwin would not have sold the 500 shares of National Video through Hayden, Stone if he had known that Dempsey-Tegeler would subsequently request delivery of another 500 shares (229-230).

From and after November 4, 1965, to and including December 31, 1965, Dempsey-Tegeler's records reflected that Irwin was "short" or had failed to deliver 500 shares of National Video (146-148). This reflected short position on its records was due to the fact that due bills had not been demanded or delivered in connection with Irwin's delivery of 500 shares on October 19, 1965 (109-110, 118). The customer's month-end statements for the months of November and December, 1965, which reflected Irwin's position according to Dempsey-Tegeler's records, were not received by Irwin until March, 1966 (205-206).

In early January, 1966, as a result of his examination of Irwin's month-end statement for December, 1965, Bell first became aware of the fact that Dempsey-Tegeler's records reflected that Irwin was "short" 500 shares of National Video, and he then informed Shields of this situation (92-

94). Prior to being informed by Bell of the short position, Shields did not realize that the records reflected Irwin to be in a short position; indeed, Shields was under the impression that Irwin was "even" (70-72). After being so advised by Bell, Shields told Bell to check the records to be absolutely sure of the short position (70). Bell said that he would recheck his records and "get back to" Shields (69). At this time, Shields was of the opinion that the records of Dempsey-Tegeler were "fouled up", and he had so stated to Irwin (74-76). Further, Shields held Bell responsible for the condition of the records, and he had informed Irwin of his conclusion that Bell was responsible for this situation (76, 274).

In his deposition, Shields testified that about one week after he learned from Bell that the records showed Irwin short, he called Irwin and informed him of the situation (69-71). He further testified that all he could remember Irwin saying was that he (Irwin) did not have the stock (77).

Shields told Bell to check with the transfer agent, and approximately one week thereafter Bell informed Shields that the transfer agent had said the 500 shares were mailed to Irwin (78). Shields then called Irwin and told him what the transfer agent had said (78). Shields stated he couldn't recall what Irwin's reply was to his advice as to what had been learned from the transfer agent (78-79).

Irwin testified upon deposition that Shields first informed him of the short position in late February, 1966 (207-208). He further testifield that he told Shields that he had delivered the shares in accordance with Dempsey-Tegeler's request; that he did not know he was in a short position; that he had never been in a short position in his life; and that if they could prove to him that he owed the the shares, he would deliver the shares if he had to pur-

chase them (207-208). Irwin testified that the next communication he had from Dempsey-Tegeler was when Bell wrote him on March 17, 1966, setting forth Bell's understanding of the transaction (208, 19-21).

After Bell's discovery of the short position on Dempsey-Tegeler's records in January, 1966, he called Shields and told him that he wanted receipt of the shares (100). Thereafter, he called Shields once or twice a week during February, 1966, seeking to obtain delivery of the shares (103). In the third week of February, Shields told Bell that Irwin had said that he did not owe Dempsey-Tegeler the shares (104). Simultaneously, Shields told Bell to recheck the account (104). Bell rechecked the account and again explained to Shields that Irwin owed the stock (104-105). Shields again communicated with Irwin, and thereafter Shields again told Bell that Irwin said he did not owe the shares (105).

In the first or second week of March, Bell again asked Shields about the short position (106). Shields said that Irwin's auditors had said he did not owe Dempsey-Tegler the shares (106). At the same time, Shields asked Bell to write a letter to Irwin recapping all of the transactions and to send Irwin copies of the monthly statements for October, November and December, 1965 (106).

On March 17, 1966, Shields had a conversation with Irwin's secretary; he advised her that Dempsey-Tegeler showed receipt of 500 shares on October 28, 1965 and that they did not know where such shares had come from since Dempsey-Tegeler's auditors had taken their October, 1965 records (30). Shields further stated that the "cut off" date for the split was October 28, 1965 and if the shares had been received on that date "it was too late to have the name taken off to avoid the split" (30). This advice was erroneous for the only shares which Shields could have had

reference to were delivered on October 19, 1965 (30-31). In addition, Shields' oral advice was inaccurate because the "cut off" date for the split was not October 28, 1965 but October 14, 1965 (4, 16-17). This erroneous advice was communicated to Irwin (30-31). On the same day, Bell wrote a letter to Irwin "recapping" the National Video transactions and requesting delivery of 500 shares (107, 19-21).

Shields' oral advice to Irwin's secretary and Bell's letter of the same date to Irwin are directly contradictory to each other on the question crucial to whether Irwin was in fact short—the "cut off" date of the split and when Irwin had made his first 500 share delivery. Indeed, if Shields' advice as to the "cut off" date was accurate, Irwin had in fact delivered all of the shares that Dempsey-Tegeler was ever entitled to.

On March 23, 1966, Ernst & Ernst, Irwin's auditors, informed Irwin by letter that after his last sale of National Video shares through Dempsey-Tegeler, he owned 500 shares of that stock (22-23, 215-216). On March 25, 1966, Irwin referred Dempsey-Tegeler's letter of March 17 to Ernst & Ernst (216).

Irwin's refusal or failure to deliver was referred to Bryan, Cave, McPheeters & Roberts, attorneys for Dempsey-Tegeler; and by letter of March 28, 1966, these attorneys demanded that Irwin make an immediate delivery of 500 shares of National Video (24). Irwin did not answer this letter (219). At or about this time, Shields told Irwin that he had appealed to Mr. Tegeler of Dempsey-Tegeler in his behalf because the mistake resulting in the confusion over the shares of National Video had been made by Dempsey-Tegeler and that he "got nowhere" (219-220). Irwin broke off relations with Dempsey-Tegeler and Shields (220).

On or about April 15, 1966, Bell placed a telephone call to Irwin (111-112). Bell told Irwin that he had to deliver the stock or that they would purchase the stock for his account (111-112, 209). Bell told Irwin, "Mr. Irwin, you know damn well you owe the shares because you have the letter" (209). Bell then implied that Irwin was trying to get away with something (210). Irwin said he had not heard from the accountants, and Bell called him a "liar" (209). At this point, Bell arranged to have John D'Asaro of Ernst & Ernst tied into his long distance call to Irwin (210-211). At first, D'Asaro failed to answer Irwin's questions as to whether the records showed stock due Dempsey-Tegeler (113). D'Asaro finally said that the records did so show (113). Irwin told Bell that he would not deliver the stock and that Shields had told him that he (Irwin) did not owe Dempsey-Tegeler the stock (114). Bell then threatened to buy the shares for Irwin's account, and Irwin told him that if he did so he did it at Dempsey-Tegeler's risk (212). At the time of this telephone conversation with Bell, Irwin had not received any oral or written communication from D'Asaro or Ernst & Ernst advising him that the records showed National Video shares due Dempsey-Tegeler (209, 212).

On April 18, 1965 Dempsey-Tegeler, purportedly acting as agent for Irwin, purchased 500 shares of National Video at a cost, including a commission, of $55,417.96 (7-8).

Thereafter, after consultation with another accountant, Irwin purchased 500 shares of National Video at $79.00 per share—approximately the same price he received for the 500 shares sold in December, 1965—and tendered them to Dempsey-Tegeler (180, 220-2). His offer was rejected (221). Irwin suffered a substantial loss on the National Video shares so purchased (221).

JURISDICTION BELOW.

Jurisdiction in the District Court was based upon diversity of citizenship and the requisite amount in controversy (3, 9). 28 U. S. C. 1332.

ARGUMENT.

INTRODUCTION.

This was an action for breach of an implied contract and for conversion; it was not an action to recover the amount by which Irwin was alleged to have been unjustly enriched.[1]

After considerable depositional discovery had occurred and "numerous" documents had been filed (the extracts of the deposition testimony comprise approximately 180 pages of the printed appendix below) the District Judge granted summary judgment, in a factual situation which is "somewhat complex" (231). In determining that summary judgement was appropriate, the District Judge conceded that there was evidence before him that Respondent Dempsey-Tegeler had breached duties owed to Petitioner Irwin (239-240). Nevertheless, summary judgment was entered against Irwin on the grounds that (1) Irwin had ratified the breaches of duty of Dempsey-Tegeler (241-245), and (2) Dempsey-Tegeler had relied upon the statement or promise of Irwin, and consequently Irwin was estopped from denying an obligation to deliver National Video shares to Dempsey-Tegeler when the demand was made upon him in April, 1966 (245-247). The District Judge explicitly held, for purposes of Rule 56, that there was no genuine issue of material fact as to Irwin's full *knowledge*

1. A possible explanation for the Plaintiff's failure to seek recovery on the theory of unjust enrichment is that the amount by which Irwin has allegedly been unjustly enriched is approximately equal to the value of the shares tendered to Dempsey-Tegeler prior to the commencement of this action and that the amount expended by Dempsey-Tegeler to cover the short position is substantially in excess of the amount by which Irwin was alleged to have been unjustly enriched.

of the material facts surrounding the breaches of duty of Dempsey-Tegeler so as to constitute a ratification and that there was no genuine issue of material fact that Dempsey-Tegeler *relied* upon Irwin's statement or promise so as to create an estoppel against Irwin (244-247).

The District Court's sole basis for concluding that there was no genuine issue as to Irwin's *knowledge* of the breaches of duty was Irwin's statement to Shields, when informed by Shields that the records showed a short position, that he (Irwin) had delivered the shares in accordance with Dempsey-Tegeler's request; that he did not know that he was in a short position; that he had never been in a short position in his life; and that if they could prove to him that he owed the shares, he would deliver the shares if he had to purchase them (241-244).

The District Court's sole basis for concluding that there was no genuine issue of material fact as to Dempsey-Tegeler's reliance (so as to constitute an estoppel) was the deposition testimony of Dempsey-Tegeler's Executive Vice-President that Dempsey-Tegeler relied upon Irwin's statement or promise (245).

The Court of Appeals affirmed the summary judgment on the basis of ratification and did not reach the question of estoppel and that which necessarily underlay estoppel—reliance. We suggest that the Court of Appeals did not affirm the District Judge's ruling as to estoppel and reliance because of the record herein and also because such a holding would fly in the face of the decisions of this Court in *Sartor* v. *Arkansas Gas Corp.*, 321 U. S. 620, 627-628 (1944) and *Poller* v. *Columbia Broadcasting System*, 368 U. S. 464, 473 (1962). The Executive Vice-President of Dempsey-Tegeler's testimony as to Dempsey-Tegeler's reliance was plainly for the jury under the prescriptions of *Sartor* and *Poller, supra.*

In upholding summary judgment on the theory of ratification, the Court of Appeals said:

> "Defendants contend that summary judgment for the plaintiff was improperly granted because there were various issues of fact to be resolved. There is no disagreement as to the statement by Irwin promising to deliver 500 shares of National Video if the plaintiff proved that he owed it. The district court held that this promise constituted a ratification of any wrongful acts by plaintiff. Since the facts in this case which allegedly constituted the ratification are undisputed and presented no genuine issue of material fact for a jury, the district court appropriately disposed of the issue by summary judgment. *Cf. Zahora* v. *Harnischfeger Corporation*, 404 F. 2d 172 (7th Cir. 1968). The district judge, faced with no question as to which reasonable minds could differ, applied the legal criteria as to what constitutes ratification. The *consent to be bound by the acts of the plaintiff was manifest in the verbal statement of Irwin.* We affirm the district judge's conclusion that the promise to deliver the shares constituted a ratification by Irwin.
>
> * * * * *
>
> "Here, there was *no question as to the meaning* of Irwin's words *consenting* to deliver the 500 shares.
>
> * * * * *
>
> "Here, Irwin was sufficiently *aware* of the transactions involving the purchase and sale of National Video shares to *know* the nature of the conduct he was ratifying. . . ." (Emphasis supplied.) (App. 4a, 5a.)

I.

THE HOLDING OF THE COURT OF APPEALS THAT SUMMARY JUDGMENT WAS APPROPRIATE WHERE THE QUESTION WAS IRWIN'S KNOWLEDGE AND INTENT IS CONTRARY TO THIS COURT'S DECISIONS IN WHITE MOTOR CO *v.* UNITED STATES AND POLLER v. COLUMBIA BROADCASTING SYSTEM, INC. AND THEREBY IRWIN HAS BEEN DENIED HIS RIGHT TO A JURY TRIAL.

Ratification is based upon the *intention* of the alleged ratifier *and his full knowledge of all* the material facts surrounding the conduct which he is ratifying. *Wing* v. *Lederer*, 77 Ill. App. 2d 413, 418, 222 N. E. 535, 538 (1966). The principles of *Wing* were recognized by the Court of Appeals (App. 4a).

Below, summary judgment was granted where the issues concerned "knowledge" and "intent" (App. 4a-5a). Such a holding is absolutely contrary to the oft-cited decisions of this Court concerning summary judgment.

In *White Motor Co.* v. *United States*, 372 U. S. 253 (1963), this Court said:

> "Summary judgments have a place in the antitrust field, as elsewhere, though as we warned in *Poller* v. *Columbia Broadcasting Systems*, 368 U. S. 464, 473, they are not appropriate 'where motive and intent play leading roles.' " p. 259.

Here, "leading roles" were played by "knowledge" and "intent"; yet, despite the prescriptions of this Court summary judgment was entered—indeed, in the face of a jury demand.

Almost equally as important, there is just no evidence in this record as to what Irwin knew concerning the breaches of duty of Dempsey-Tegeler at the time he made the statement or promise to Shields; and this situation,

surprisingly enough, was recognized by the District Judge, for he said in his memorandum opinion: "Of course [Irwin] did not know the true facts of the situation, for if he had, there would have been less occasion to make the promise in the contingent manner in which it was made." (244). In fact, the promise or statement of Irwin is evidence of his lack of knowledge, for at the same time he asked for proof of the short position (207-208).

We respectfully submit that the entry of summary judgment below, where the questions of "intent" and "knowledge" were involved, was in derogation of this Court's decisions and served to deprive the Petitioners of their right to trial by jury.

II.

THE INFERENCE MADE BY THE COURT OF APPEALS THAT IRWIN HAD THE REQUISITE KNOWLEDGE AND INTENTION TO RATIFY THE WRONGFUL ACTS OF DEMPSEY-TEGELER IS IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN UNITED STATES v. DIEBOLD, INC. AND WITH CONTROLLING DECISIONS ON THIS ISSUE IN THE COURTS OF APPEALS FOR THE SECOND, SIXTH, EIGHTH, NINTH AND TENTH CIRCUITS.

It has long been held in this Court and in at least five of the Circuits (Second, Sixth, Eighth, Ninth and Tenth) that the mere existence of an undisputed subsidiary or underlying fact (here Irwin's promise or statement) does not permit the entry of summary judgment if the inferences to be drawn therefrom and other evidence in the record are disputed. *United States* v. *Diebold*, 369 U. S. 654, 655 (1962); *Empire Electronics Co.* v. *United States*, 311 F. 2d 175, 179-180 (2nd Cir., 1962); *Hart* v. *Johnson*, 389 F. 2d 239, 241-242 (6th Cir., 1968); *S. J. Groves & Sons* v. *Ohio Turnpike Commission*, 315 F. 2d 235, 237-238 (6th Cir., 1963); *Severson* v. *Fleck*, 251 F. 2d 920 (8th

Cir., 1958); *Cameron* v. *Vancouver Plywood Corporation*, 266 F. 2d 535, 539-540 (9th Cir., 1959); and *United States* v. *Kansas Gas and Electric Company*, 287 F. 2d 601 (10th Cir., 1961). This basic rule was succinctly stated in *S. J. Groves & Sons Company* v. *Ohio Turnpike Commission*, *supra*, at 237-238.

> "It is often the case that although the basic facts are not in dispute, the parties in good faith may nevertheless disagree about the inferences to be drawn from these facts, what the intention of the parties was as shown by the facts, or whether an estoppel or a waiver of certain rights admitted to exist should be drawn from such facts. Under such circumstances the case is not one to be decided by the Trial Judge on a motion for summary judgment."

But what is prohibited by *Diebold* and the cases from the other circuits which are cited above was effected below —Irwin's *knowledge* and his *intention* (so as to constitute ratification) were inferred from his statement to Shields that he did not know he was in a short position, that he had made deliveries in accordance with Shields request, that he had never been in a short position on any stock in his life and *that if Dempsey-Tegeler could prove to him that he owed* the shares he would deliver them. We suggest that the inference of *knowledge* and *intent* from this statement is without basis in fact; indeed, the inference of a lack of knowledge is plainly inferable from Irwin's request for *proof*. At best Irwin's statement was ambiguous and equivocal, and this was recognized by the Court of Appeals (App. 3a).

But wholly apart from nature and character of his statement, there was other evidence in the record (also undisputed), from which an inference of the absence of the requisite knowledge and intention on the part of Irwin could be inferred.

We believe that the existence of a genuine issue of fact as to Irwin's requisite intention and knowledge is plainly demonstrated rhetorically. Would a jury be entitled to infer that Irwin lacked the requisite knowledge of the prior wrongful conduct and the intent to ratify such wrongful conduct if the following events and statements were placed in evidence before them?

1. At the time of Irwin's statement to Shields, upon which the Court of Appeals relies, Irwin stated to Shields that he did not know that he was in a short position (207).

2. At that time Irwin asked for the proof of the short position (208).

3. At that time the only source of Shields' information was Mr. Bell of Dempsey-Tegeler who Shields held responsible for certain records of Dempsey-Tegeler being "fouled up" (74-76).

4. At or before that time Shields had told Irwin that Bell was responsible for the aforesaid condition of the records (74-76).

5. Irwin told Shields to get the information for him (208).

6. At or about the time of the statement by Irwin, Shields requested that Bell write Irwin a letter explaining what had happened with respect to the transactions in National Video and that Irwin be sent certain prior monthly statements concerning the account which had not been theretofore received by Irwin (106-107, 204-205).

7. *Subsequent* to the statement of Irwin, Bell sent Irwin a letter which attempted to inform him of what had happened in connection with the transactions in National Video (18-21, 208).

8. That letter was referred by Irwin to his accountants (171).

We respectfully submit that a jury would be entitled, indeed constrained, to infer and conclude that Irwin did not have the requisite knowledge or intention at the time he made that statements to Shields so as to be held to have ratified Dempsey-Tegeler's wrongful conduct.

Furthermore, Irwin specifically testified to his lack of knowledge. Upon deposition, he said:

> "Q. At the time you sold those shares [shares sold on December 27, 1965], did you know, in fact, that Dempsey-Tegeler was going to require you to deliver an additional five hundred shares?
>
> A. No.
>
> Q. Did you have any knowledge that your previous deliveries of National Video had been deficient in any manner?
>
> A. No, sir." (229-230.)

The Opinion of the Court of Appeals in this case unequivocally conflicts with pertinent decisions of this Court and with controlling decisions in the Second, Sixth, Eighth, Ninth and Tenth Circuits. The result of this has been to deny Petitioners their right to trial by jury.

CONCLUSION.

Here, Dempsey-Tegeler who admittedly owed certain duties to Irwin, who undertook to seasonably and accurately inform him of his securities' delivery requirements, and who admittedly breached those duties has been made completely whole by the entry of summary judgment. In view of the prescriptions of this Court concerning the entry of summary judgment, we respectfully submit that substantial error was committed below—as a result of which Irwin has been denied his Constitutional right to trial by jury.

We do not and never have suggested that Irwin does not owe Dempsey-Tegeler something. But Dempsey-Tegeler

has elected not to proceed on a theory of unjust enrichment; it has sought to make itself whole despite its admitted breaches and defalcations against Irwin. It is important to keep in mind that the dispute between Irvin and Dempsey-Tegeler stemmed from the negligence and wrongdoing of Dempsey-Tegeler.

Moreover, Irwin did, after the facts were made known to him, buy 500 shares of National Video and tender it to Dempsey-Tegeler.

The effect of the decision below is to reward a negligent stock broker at the expense of his customer, who sought only to be informed of his position. This result we believe is unrealistic and effectively permits a wrongdoer to profit by his own wrong.

Since the decision below is in direct conflict with decisions of this Court and with decisions in several of the other circuits and has served to deny Irwin his constitutional right to a trial by jury, we respectfully submit that certiorari be granted.

Respectfully submitted,

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BISHOP, BURDETT, ERICSON & FLYNN,
Of Counsel.

Appendix

APPENDIX.

OPINION AND JUDGMENT BELOW.

IN THE UNITED STATES COURT OF APPEALS,

For the Seventh Circuit.

September Term, 1968—April Session, 1969.

Nos. 17007, 17008

DEMPSEY-TEGELER & Co., INC.,
Plaintiff-Appellee (Cross-Appellant),

vs.

RICHARD D. IRWIN and
ANNE MARIE IRWIN,
Defendants-Appellants (Cross-Appellees).

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

August 5, 1969.

Before HASTINGS, *Senior Circuit Judge,* and KILEY and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* Plaintiff-appellee, Dempsey-Tegeler & Co., Inc., filed suit under 28 U. S. C. § 1332 to recover for failure of defendants-appellants, Richard D. Irwin and Anne Marie Irwin to deliver 500 shares of National Video Corporation stock. The district court having before it the pleadings, documentary evidence and

extensive depositions, granted summary judgment for the plaintiff from which defendants appeal. Plaintiff cross-appeals from the denial of interest.

Since 1963, Richard D. Irwin and his wife, Anne Marie Irwin, for whom Richard Irwin acted as agent in all stock transactions, traded extensively in corporate stocks. Dempsey-Tegeler & Co., Inc., plaintiff, acted as agent and broker for the Irwins. Plaintiff's representative in all transactions between the plaintiff and defendants was Robert Shields. Since Irwin was a very busy individual, he instructed Shields to keep records of all transactions. The following records were kept by Shields: (1) a book reflecting Irwin's current position in a security; (2) copies of all purchase and sale confirmations sent to Irwin; and (3) copies of monthly statements of account sent to Irwin.

Prior to September 13, 1965, Irwin owned 1500 shares of National Video Corporation which traded on the American Stock Exchange. On September 13, 1965, the Board of Directors announced a proposed 2 for 1 stock split to be acted upon at the annual meeting on October 13, 1965. On September 29, 1965, Irwin sold 500 shares of National Video. The American Stock Exchange announced on October 8, 1965, that the stock of National Video would sell "ex" the distribution on November 1, 1965, and that all stock delivered after October 12, 1965, must be accompanied by a due bill to be redeemed on November 5, 1965, by the delivery of the shares distributed as a result of the split.

Shields on October 18, 1965, requested from Irwin's secretary the delivery of 500 shares of National Video sold on September 29. Irwin sold an additional 500 shares of National Video on October 22, 1965, which was prior to the date the shares were traded "ex" distribution on the American Stock Exchange. Sometime after October 28, 1965, he received 1500 split shares from National Video

in the mail. On November 3 and again on November 4, Irwin sold 500 shares, or a total of 1000 shares of National Video for the two days. Not including the sale on September 29, Irwin sold 2000 shares. Shields called Irwin's secretary on November 18, 1965, and asked her to deliver 2000 shares of National Video in order to settle the account. Since the September 29 sale was not settled until after the corporate record date of the split, the split shares should have been delivered to Dempsey-Tegeler when they were received by Irwin in order to settle the transaction. However, no request was made for the 500 split shares of National Video, and Irwin sold these extra 500 shares of National Video through another broker on November 27, 1965, while in Florida.

In late February, 1966, Irwin was first informed by Shields that he was short 500 shares of National Video to Dempsey-Tegeler. Irwin was equivocal and Shields, being unable to explain how the short position arose, said he would have the account rechecked. Irwin stated that if it could be proved that he owed plaintiff the stock, he would deliver 500 shares. Various discussions took place between officials of Dempsey-Tegeler and Irwin and his accountants. At all times Irwin denied that he owed 500 shares and claimed that plaintiff failed to prove otherwise. On April 16, 1966, an official of the plaintiff called Irwin in Ohio and demanded payment. Irwin's accountant was connected to the long distance call and after prodding by Irwin, admitted that Irwin owed the shares, but Irwin denied this short position. Plaintiff demanded payment by April 18. Since defendant did not deliver on April 18, plaintiff purchased 500 shares on the open market at a price of $111 per share. In the early part of May, Irwin consulted another accountant who confirmed that Irwin was short 500 shares. When the price of National Video fell to $79 per share, Irwin purchased 500 shares and

tendered them to plaintiff. Plaintiff refused and this suit to recover the cost of the 500 shares purchased on April 18, 1966, followed.

Defendants contend that summary judgment for the plaintiff was improperly granted because there were various issues of fact to be resolved. There is no disagreement as to the statement by Irwin promising to deliver 500 shares of National Video if the plaintiff proved that he owed it. The district court held that this promise constituted a ratification of any wrongful acts by plaintiff. Since the facts in this case which allegedly constituted the ratification are undisputed and presented no genuine issue of material fact for a jury, the district court appropriately disposed of the issue by summary judgment. Cf. *Zahora* v. *Harnischfeger Corporation,* 404 F. 2d 172 (7th Cir. 1968). The district judge, faced with no question as to which reasonable minds could differ, applied the legal criteria as to what constitutes ratification. The consent to be bound by the acts of the plaintiff was manifest in the verbal statement of Irwin. We affirm the district judge's conclusion that the promise to deliver the shares constituted a ratification by Irwin.

Ratification is a unilateral act and reliance is not a necessary element. Seavy, Law of Agency, § 37 (1964). Reliance is a necessary ingredient where the theory is one of estoppel. If the consent is not manifest but must be inferred from physical acts or from silence, it may be possible to hold that there was sufficient reliance on the conduct such that the party is estopped from denying ratification. *Id.* § 40. Here, there was no question as to the meaning of Irwin's words consenting to deliver the 500 shares.

It is not necessary as defendants claim, that the ratifier have complete and full knowledge of all acts and circum-

stances surrounding the transaction. Rather, if the ratification is made with knowledge of the material facts, it is valid. *Wing* v. *Lederer,* 77 Ill. App. 2d 413, 418 (1966). Here, Irwin was sufficiently aware of the transactions involving the purchase and sale of National Video shares to know the nature of the conduct he was ratifying, and he should be held responsible for his promise. Meyer, The Law of Stock Brokers and Stock Exchanges, 408-12 (1932). Irwin's promise to deliver would be meaningless, if at the time the promise is made he is required to have full knowledge that he was short 500 shares.

Irwin contends that the damages should be based on the market price of the stock at the date the shares should have been delivered. Here, however, Irwin ratified the failure to require delivery and did not repudiate his promise until April 18, 1966.

Defendants also contend that since plaintiff agreed to keep the records of account and because of negligence failed to inform defendants that the shares were owed, plaintiff waives the right to demand the securities. Since defendants ratified the wrongful acts of the plaintiff, they cannot now assert the doctrine of waiver and estoppel.

Plaintiff cross-appeals from the denial of interest from date of the purchase by the plaintiff of 500 shares on April 18, 1966. Since this is an action under diversity jurisdiction, this Court must apply the Illinois law governing interest. *Midstates Oil Corp.* v. *Waller,* 207 F. 2d 127, 131 (5th Cir. 1953).

Ill. Rev. Stat. ch. 74 § 2 provides:

> Rate on money after due
>
> Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; on money lent or

> advanced for the use of another; on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance; on money received to the use of another and retained without the owner's knowledge; and on money withheld by an unreasonable and vexatious delay of payment. 1879, May 24, Laws 1879, p. 184, § 2; 1891, June 17, Laws 1891, p. 149, § 1.

Plaintiff contends that the confirmation of the April 18, 1966, transaction sent to defendants constitutes an "instrument of writing." However, since there was no underlying agreement as to the purchase, the confirmation does not come within the statutory construction of "other instrument of writing." Ill. Rev. Stat. Ann. ch. 74 § 2, n. 51-100. Since there was no authorization to purchase the stock, the purchase price was not "advance for the use of another." There was no "settlement of account" since defendants did not admit to the owing of any stock on April 18. *Underhill* v. *Goff*, 48 Ill. 198 (1868); *Marione* v. *Ehrat*, 175 Ill. 649 (1912). Too, we do not think under the circumstances presented that the money was "withheld by an unreasonable and vexatious delay." Therefore, plaintiff is not entitled to interest from April 18, 1966, to the date of the judgment.

AFFIRMED.

UNITED STATES COURT OF APPEALS,
For the Seventh Circuit,
Chicago, Illinois.

Tuesday, August 5, 1969.

Before
HON. JOHN S. HASTINGS, *Senior Circuit Judge,*
HON. ROGER J. KILEY, *Circuit Judge,*
HON. OTTO KERNER, *Circuit Judge.*

Nos. 17007, 17008
DEMPSEY-TEGELER & CO., INC.,
Plaintiff-Appellee (Cross-Appellant),
vs.
RICHARD D. IRWIN and ANNE MARIE IRWIN,
Defendants-Appellants (Cross-Appellees).

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with interest, from the date of the judgment of the District Court, in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that there be no recovery of costs between the parties to this appeal.

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No. 814

In the
Supreme Court of the United States
OCTOBER TERM, 1969

RICHARD D. IRWIN and
ANNE MARIE IRWIN,
Petitioners,

vs.

DEMPSEY-TEGELER & CO., INC.,
a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Question Presented For Review

Petitioners made sales of National Video stock through the respondent broker during a period when National Video stock was split.[1] Following the completion of Irwin's sales, the broker erroneously advised Mr. Irwin that he owed a balance of 2,000 National Video shares, when in fact he owed 2,500 shares to the broker. After a delay of approximately three months, the broker discovered its error and advised Irwin that he still owed 500 shares. Irwin questioned whether he owed the 500 shares, but promised

[1] Mr. Irwin acted as his wife's agent in dealing with respondent, handled all security transactions for his wife's account and had full authority from her to buy and sell securities on her behalf (9-10, Irwin Deposition, Vol. 1 pp. 34-35). Unless otherwise indicated, all references are to pages of the Joint Appendix.

that if it was proved that he owed them, he would deliver the shares even if he had to purchase them (Irwin had already sold the missing 500 shares through another broker). Irwin's own accountants subsequently confirmed that he did in fact owe the missing 500 shares claimed by the broker. Irwin then for the first time repudiated his promise, refused to deliver the missing 500 shares and the broker, after due notice, purchased an equivalent number of shares in the open market. On these undisputed facts, the District Court entered summary judgment in favor of the broker, holding that there was no genuine issue of material fact and that the broker was entitled to judgment as a matter of law on two distinct grounds, (1) that Irwin's promise to deliver the missing 500 shares if he owed them constituted a ratification of any prior erroneous advice and delay by the broker, and (2) that Irwin was equitably estopped to deny liability in view of the broker's action in postponing a covering purchase of the missing shares in reliance on Irwin's promise to deliver the shares if he owed them. The Court of Appeals affirmed the District Court on the first ground of ratification and did not find it necessary to reach the second ground of equitable estoppel.

The sole issue presented here is whether at the time of his promise to deliver the missing shares if he owed them, Irwin had sufficient knowledge of the material facts to be able to effectively ratify the broker's prior delay and erroneous advice. The courts below held that Irwin's undisputed knowledge of his prior sales transactions, together with his knowledge of the broker's earlier erroneous advice and the broker's intervening delay in claiming the missing shares constituted sufficient knowledge of the material facts and that Irwin, therefore, effectively ratified any negli-

gence by the broker. Petitioners contend that this knowledge was not sufficient as a matter of law and Irwin should not be bound by his undisputed promise absent proof that he knew at the time whether or not he was in fact short the 500 shares (Pet., pp. 18-21).

Statement of the Case

The material facts are adequately set forth in the opinions of the District Court (A1-A18 of separate Appendix to the Petition and 231-250 of the Joint Appendix) and of the Court of Appeals (reported at 415 F. 2d 1348 and reprinted at pp. 1a-6a, Appendix to the Petition).

Reasons For Not Granting The Writ

1. The issue presented is a narrow question of state law as to what knowledge is required on the part of a customer before he can effectively ratify his broker's mistake. This issue has little significance beyond the unusual circumstances of this case and lacks the importance which would justify review by this Court.

2. The decision below is based on undisputed facts and is correct as a matter of law.

3. There is no conflict between the decision below and any decision of this Court or other courts of appeal relied on in the Petition.

4. No issue of federal law is involved apart from the claim that there was a genuine issue of material fact precluding the entering of summary judgment under Rule 56. However, both courts below correctly decided that the material facts are undisputed. There is no important question of federal law requiring decision by this Court.

ARGUMENT

I.

The Decision Below Is Clearly Correct. Irwin's Promise in Early 1966 to Deliver 500 National Video Shares to Dempsey-Tegeler If Petitioners Owed Them Ratified Any Prior Breaches of Duty by Dempsey-Tegeler. There Is No Genuine Issue of Material Fact Regarding Irwin's Ratification.

The Irwins' position is that Dempsey-Tegeler is barred from recovery in this case because of various negligent breaches of duty. The breaches of duty ascribed by Irwin to Dempsey-Tegeler boil down to the claim that Dempsey-Tegeler erroneously advised him in mid-November 1965 that petitioners owed only 2,000 National Video shares to Dempsey-Tegeler, when in fact they owed 2,500 shares and that Dempsey-Tegeler delayed until early 1966 before advising Irwin of petitioners' short position and requesting delivery of the missing shares.[2]

The District Court and the Court of Appeals held that even assuming Dempsey-Tegeler guilty of the breaches of duty charged by the petitioners, Dempsey-Tegeler nevertheless is entitled to recover in view of Irwin's undisputed promise in early 1966 to deliver the missing shares if petitioners owed them. The courts below correctly held that this promise ratified any prior breaches of duty by Dempsey-Tegeler.

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[2] The missing 500 shares were sold by Irwin on December 27, 1965 through another broker for proceeds of $38,604.78, proceeds which petitioners have retained. Petitioners had previously realized a profit of approximately $111,000 on their purchases and sales of National Video stock through Dempsey-Tegeler. Irwin deposition, Vol. II, pp. 94-95.

Here is Irwin's own testimony regarding his crucial ratifying promise:

> [Mr. Irwin] "A. It would be after the first of the following year when this development came about that Dempsey-Tegeler then began to say that I owed them five hundred shares of Video and that I had a short position. And I explained to Mr. Shields that I had delivered in accordance with his request and the request of Dempsey-Tegeler; that I was unaware that I was in a short position; that I had never been in a short position on any stock in my life; and as far as Video was concerned, that if they could prove to me that I owed the shares, I would deliver the shares if I had to purchase them.
>
> • • •
>
> "And I made the statement to him at that time that I had no desire to prove it at the expense of anybody, and that if I owed the shares, I would deliver the shares. But I wanted proof of it." (207-08).

When asked how the matter was left at the end of that conversation, Irwin testified:

> "When they delivered proof if I owed the shares I would deliver the shares." (208).

After Dempsey-Tegeler wrote to petitioners on March 17 explaining the petitioners' short position, and on March 28 repeating its request for the missing shares, his own accountants finally confirmed to Irwin on April 15, 1966 that the petitioners did, in fact, owe 500 National Video shares to Dempsey-Tegeler. But by this time the market price of National Video stock had gone up to approximately $111 per share and the petitioners refused to deliver the stock. On April 18, following this repudiation of their obligation by petitioners, Dempsey-Tegeler replaced the missing shares by purchasing them in the open market.

Irwin's assurance, given to Mr. Shields when he was first asked for the missing shares in early 1966, that he would deliver the missing shares if and when it was proved that he owed them, constituted an express ratification of any prior erroneous advice, delay, or other delinquency by Dempsey-Tegeler. Both courts below correctly held that this assurance ratified any prior breaches of duty by Dempsey-Tegeler and thus made the petitioners liable for the amount which Dempsey-Tegeler had to pay on April 18 to replace the missing shares after petitioners refused to deliver the shares in the face of their own accountants' confirmation that they did owe the shares.

Both courts below also correctly held that at the time of his promise Irwin had knowledge of the material facts regarding his transactions in National Video stock and the prior breaches of duty he has charged against Dempsey-Tegeler. He had undisputed knowledge at that time of his transactions involving the purchase and sale of National Video shares, he knew that during November 1965 Dempsey-Tegeler failed to request delivery of all the shares due after petitioners' October and November sales and he knew that Dempsey-Tegeler failed for three to four months thereafter to notify him of petitioners' short position (192, 206-207, 244), 415 F.2d at p.1351.

The applicable principle is explained in Meyer, *The Law of Stock Brokers and Stock Exchanges* (1931):

> "The general principle is that any wrongful act on the broker's part may at the election of the customer be either ratified or repudiated. . . . Any wrong committed by a broker, no matter how serious and no matter what its nature, is susceptible of ratification. This applies to the improper execution or non-execution of an order, to the wrongful sale of the customer's securities or the wrongful covering of short commitments,

and to all kinds of miscellaneous breaches of duty of which the broker may become guilty during the course of his relations with his customer.

* * *

"The first principle of ratification in stock-brokerage transactions is that a customer who wishes to take advantage of his broker's wrongful act must repudiate that act. If he does not he is deemed to have ratified it. He may not merely sit by and do nothing, but is bound at the risk of the loss of his claim affirmatively to indicate his repudiation.

> 'Ratification may be proved, not only by an express assent, * * * but also by implication from the principal's acquiescence or failure to dissent within a reasonable time after being informed by the agent of what he has done.'

"This doctrine is not unfair, for the customer should not have the privilege of withholding approval or disapproval until the market has taken a turn for better or for worse, and then assuming the position which turns out the more profitable. To accord the customer that privilege would enable him to speculate at the broker's expense. Moreover, the broker should not be placed in a position where he does not know whether his act will be affirmed or disaffirmed, and therefore cannot act intelligently to minimize his own loss before the market has undergone too great a change. The obligation to repudiate, however, does not depend on whether or not the broker in fact relies on the customer's silence." (408-12).

See also *Clews* v. *Jamieson,* 182 U.S. 461, 483, 484, 45 L.Ed. 1183, 1194 (1901); *Schaefer* v. *Dickinson,* 141 Ill.App. 234, 237 (1908); *Roney* v. *Mazzara,* 319 Mich. 103, 29 N.W. 2d 259 (1947) and *Gillett* v. *Whiting,* 141 N.Y. 71, 35 N.E. 939 (1894).

The petitioners' sole attack on the decision below is that at the time of his crucial promise Irwin did not have knowl-

edge of all of the material facts. It is difficult to determine what specific facts petitioners claim were material and not known to Irwin. At times, the Petition vaguely suggests that Irwin lacked sufficient knowledge concerning Dempsey-Tegeler's breaches of duty. Pet. p.17,20. However, as we have shown, he did then know that the broker failed in November 1965 to request delivery of all of the National Video shares which were then due, and then delayed for three to four months thereafter before informing him of his short position. These were the key breaches of duty charged against Dempsey-Tegeler. The Petition implies a theory on which a customer could never be bound even by an express ratifying promise unless he knows not just the material facts concerning the broker's mistake but also all of the details and circumstances which led to the broker's error. Such a rule would be absurdly impracticable and unfair; it would completely undermine the doctrine of ratification and invite customers to speculate at their broker's expense.

The only fact which petitioners specify about which Irwin did not have knowledge at the time of his promise was whether or not the petitioners were in fact short the missing 500 shares. However, a sufficient answer was given by both courts below, namely, to require such knowledge before holding Irwin bound by his unequivocal promise would make the promise meaningless and would defeat the purpose of the doctrine of ratification which is to protect a broker in these very circumstances.

The District Court answered this contention as follows:

> ". . . [T]he true facts of defendants' position in National Video is irrelevant to the issue of ratification. Irwin's promise contemplated that he would make up the asserted short position if it could be proved that he was short. Whether or not he actually knew he was

short at the time he made the promise, is irrelevant to the force of that promise. To say that he cannot be held to such an unqualified promise, because he did not in fact know for certain that he was short, would make the promise virtually meaningless. Of course he did not know the true facts of the situation, for if he had, there would have been less occasion to make the promise in the contingent manner in which it was made.

"Further defendants have pointed to no material fact regarding the plaintiff's breaches of duty, which Irwin did not know, but should have known in order to be bound by his ratification. It is not relevant that he was uncertain of his position in National Video. What is relevant is that at the time of his promise, he knew all of the material facts regarding the prior breaches of duty he has charged against plaintiff. He knew that plaintiff was calling upon the defendants to deliver 500 shares of National Video stock which plaintiff claimed were owing from sales in late 1965. Because he was apparently unaware of his short position, he demanded verification, requested his accountants to check into the matter, and expressly promised he would deliver the missing shares if it developed that he owed them. At that time, Irwin had full knowledge of all of the circumstances surrounding the alleged breaches of duty. Although defendants claim to the contrary, they have cited no specific facts of which he was unaware which might have affected the making of the promise." (243-44).

The rule requiring that a customer have knowledge of the material facts before he can effectively ratify his stock broker's breach of duty is typically applied in cases where the broker has deliberately concealed or misrepresented important facts, Meyer, *op.cit.*, p.433, such as whether a reported purchase or sale of securities was actually executed. *Matter of Dickinson,* 171 App.Div. 486 (New York, 1916);

Day v. *Holmes,* 103 Mass. 306 (1869). There is no suggestion here that Dempsey-Tegeler deliberately concealed or misrepresented any facts in its dealings with the petitioners. Further, as the District Court pointed out, Irwin's promise which was by its terms contingent on proof that the petitioners did in fact owe the missing 500 shares, would become completely meaningless if the petitioners could avoid that promise by pleading Irwin's uncertainty at the time regarding the very question which his promise contemplated should be resolved by proof.

At the time of his crucial promise, Irwin had knowledge of the material facts. The doctrine of ratification was properly applied in this case to prevent the unfair result it is designed to avoid, i.e., to prevent a customer from speculating at his broker's expense and to insure that the broker will know whether his acts will be affirmed or disaffirmed and be able to act to minimize his own loss before the market changes. Meyer, *op.cit.,* pp. 411-12. Irwin's assurance that he would deliver the missing shares if he owed them was given to Dempsey-Tegeler at a time when Dempsey-Tegeler could have replaced the stock at a price close to the price for which the petitioners in December 1965 sold the 500 shares which did not belong to them. The market price of National Video stock between February 14 and March 18, 1966 (the period during which Irwin made his promise) ranged between a low of $70.25 and a high of $88.25 per share (18-19) and the petitioners sold the missing 500 shares in December for approximately $78 per share (180). When Irwin gave his crucial promise to Shields, and thereafter until he repudiated his obligation on April 15, 1966, he gave Dempsey-Tegeler no warning that it should protect itself by buying in the missing shares. Irwin did not repudiate the petitioners' obligation until the market price of National Video had gone up to approxi-

mately $111 a share. Plaintiff was forced to pay this higher price in order to cover petitioners' short position at that time.

There is no dispute about the material facts. Irwin's promise is clear and is based on his own admissions. Petitioners' claim that Irwin lacked required knowledge at the time of his promise is without support in the facts and is erroneous as a matter of law.

Respondent also urges that the judgment below was correct on the alternative ground of equitable estoppel. We limit our argument on this point to a reference to the discussion of this issue by the District Court (245-47).

II.

This Case Was Appropriately Disposed of Below by Summary Judgment Because the Controlling Facts on the Issue of Ratification Were Undisputed. Petitioners Came Forward With No Genuine Issue of Fact Requiring a Trial. The Decision Below Is Not in Conflict With Any of the Cases Relied on in the Petition.

Although the District Court characterized the factual situation leading to this case as "somewhat complex" (231), the material facts developed in extensive discovery of documents and depositions taken by both sides are undisputed. The facts concerning petitioners' transactions in National Video stock are based on unchallenged documents in the record and are undisputed, as is the fact that following the petitioners' delivery of 2,000 shares during November 1965 they remained short 500 shares owed to the broker, shares which they had received in stock split. The facts regarding Irwin's crucial promise to deliver the shares if he owed them are based entirely upon Irwin's own admissions (206-08). Petitioners in the course of discovery took full depositions from four of Dempsey-Tegeler's employees. In addition, depositions were taken

from Irwin himself and his accountants (164). Petitioners had full opportunity to come forward in the depositions or by affidavit to develop any material evidence contrary to the undisputed material facts here with respect to Irwin's promise and ratification.

As Judge Learned Hand pointed out in *Radio City Music Hall Corp.* v. *U. S.*, 135 F.2d 715, 718 (C.A.2, 1943), where the plaintiff's proof is specific and the defendant has had an opportunity to cross examine, the defendant cannot oppose summary judgment by mere hypothesis, but must specify some opposing evidence which it can adduce, and which will change the result. The petitioners here have utterly failed to meet this requirement.

Part II of petitioners' argument in effect concedes that the material facts in this case were undisputed but relies on a line of cases holding that summary judgment is inappropriate where, although the facts are undisputed, conflicting inferences may be drawn from those facts. Petitioners argue that conflicting inferences are possible here regarding Irwin's intention and knowledge at the time of his crucial promise.

As to Irwin's intention to ratify, the Petition fails to raise any issue whatever, beyond the bare assertion that Irwin's promise was somehow ambiguous and equivocal. Pet., p.19. The only support advanced for this assertion is a reference to a statement in the Court of Appeals opinion that "Irwin was equivocal" when he was first informed that he was short 500 shares of National Video to Dempsey-Tegeler, 415 F.2d, at p.1350. But this clearly refers to Irwin's equivocation at that time as to whether he owed the shares which were still due to the broker (207-08). There was nothing at all ambiguous or equivocal about his undisputed promise at that time to deliver the

shares if he owed them. As the Court of Appeals said, on the very next page of its opinion:

> "Here there was no question as to the meaning of Irwin's words consenting to deliver the 500 shares." 415 F.2d, at p.1351.

As to Irwin's knowledge, the conflicting inferences which petitioners urged could be drawn from the evidence and testimony referred to at pages 20-21 of the Petition all boil down to the point which we have already fully discussed, that at the time of his crucial promise Irwin did not know whether he actually owed the 500 shares claimed by the broker. This is not in dispute. Dempsey-Tegeler has never claimed that the record shows such knowledge. However, as we have fully demonstrated in Part I of this Brief, the courts below correctly held that proof of such knowledge was not required in order to hold Irwin to his clear promise.

Conclusion

There is no merit in petitioners' contentions. Two courts below determined that on the undisputed material facts and applicable law Irwin's promise ratified the respondent's mistake and on this record he should be held to that promise. For all of the foregoing reasons, the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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February 20, 1970

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 814.

RICHARD D. IRWIN AND ANNE MARIE IRWIN,
Petitioners,

VS.

DEMPSEY-TEGELER & CO., INC., A CORPORATION,
Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent's brief in opposition is a vigorous attempt to have this Court decide the merits of the Petition on the basis of the depositional testimony below. Further, much discussion is made with respect to the question of ratification. All of that is beside the basic question raised in the Petition—Were petitioners, through the implement of Rule 56 of the Federal Rules of Civil Procedure, denied their constitutional right to a jury trial? They were, as is demonstrated in the Petition.

Respondent's failure in their brief to treat of the cases of this Court and the Courts of Appeals of the Second, Sixth, Eighth, Ninth, and Tenth Circuits, which are cited at pages 17 through 19 of the Petition, can only be con-

strued as an admission that the decision below is indeed in direct conflict with those decisions, which it is.

The fact of the matter (and respondent's repetitive use of the adjective "undisputed" will not change it) is that Irwin's *knowledge* and *intent* presented genuine issues of fact for a jury. A jury trial was sought below; yet, and apart from the conflict among the circuits, petitioners right thereto under the Seventh Amendment was abrogated by the improper application of Rule 56 of the Federal Rules of Civil Procedure.

It can hardly be said that this is not a matter of importance in view of the decision in *Ross* v. *Bernhard,* No. 42. October Term, 1969, ... U. S. ..... (February 2, 1970).

The Petition herein has simply not been responded to.

Petitioners request that a writ of certiorari be granted.

Respectfully submitted,

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